

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**B.C., Appellant**

**and**

**U.S. POSTAL SERVICE, TUSTIN POST  
OFFICE, Tustin, CA, Employer**

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**Docket No. 17-0388  
Issued: June 15, 2017**

*Appearances:*  
*Linda Albers, Esq., for the appellant*<sup>1</sup>  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On December 8, 2016 appellant, through counsel, filed a timely appeal from a July 12, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision of OWCP dated August 5, 2015, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

**ISSUE**

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

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<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

On appeal, counsel contends that appellant was in the performance of duty at the time of injury and OWCP failed to follow the Board's findings and instructions by not reviewing the merits of the claim.

### **FACTUAL HISTORY**

This case has previously been before the Board.<sup>3</sup> The facts and circumstances of the prior appeal are incorporated herein by reference. Relevant facts will be set forth below.

On November 26, 2010 appellant, then a 57-year-old customer service supervisor, filed a traumatic injury claim (Form CA-1) under the current file, OWCP File No. xxxxxx615, alleging that at 7:00 p.m. on November 24, 2010 he sustained a head contusion and injuries to his nose, arm, hands, right knee, neck, and back when he tripped and fell on his face in the employing establishment's parking lot while going to his car. He stopped work on November 26, 2010.

In a November 29, 2010 letter, N.S., Postmaster, controverted the claim. She noted that appellant's tour of duty ended at 1600 hours, 3 hours before his fall. N.S. maintained that three hours was not a reasonable amount of time to exit the facility. She further maintained that on the date of injury appellant was scheduled to work 8 hours, 0700 to 1600, and he was not given any additional duties to perform. Appellant was also not authorized to be in the facility conducting personal business.

By decision dated January 18, 2011, OWCP denied appellant's traumatic injury claim because he was not in the performance of duty at the time of the November 24, 2010 incident. It also found that the medical evidence of record did not address his specific work duties or mention that his fall occurred at work.<sup>4</sup>

In a September 12, 2011 letter, received by OWCP on September 16, 2011, appellant, through counsel, requested reconsideration.

In a December 13, 2011 decision, OWCP denied modification of the July 12, 2011 decision. It found that appellant had not submitted any new evidence to establish that he was authorized to work beyond his normal work schedule or that he was performing duties related to his employment.

By letter dated April 30, 2012, counsel again requested reconsideration. She contended that appellant was on the clock at the time of injury and that the employing establishment was biased against him and failed to follow proper procedures in refusing to pay him for overtime work. Counsel submitted a March 1, 2012 declaration from J.H., a coworker, who indicated that appellant worked beyond his tour of duty on November 24, 2010. She also submitted letters dated January 19 and April 18, 2012 from C.S., a union secretary, who represented appellant during numerous fact-finding meetings with N.S. regarding his work performance that always resulted in the issuance of a letter of warning. Counsel noted that appellant had worked on

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<sup>3</sup> Docket No. 13-0290 (issued November 8, 2013).

<sup>4</sup> In the January 18, 2011 decision, OWCP also denied appellant's claim for wage-loss compensation from January 8 through 28, 2011 as he had not established an employment-related injury.

November 24, 2010 until 7:00 p.m. and explained how the employing establishment inappropriately handled supervisors who performed unauthorized overtime work.

In an August 2, 2012 decision, OWCP denied further merit review of appellant's claim. It found that the statements of C.S. were repetitious and cumulative. On November 20, 2012 appellant, through counsel, appealed to the Board.

By decision dated November 8, 2013, the Board found that OWCP had improperly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).<sup>5</sup> The Board found that the statements of J.H. and C.S. constituted relevant and pertinent new evidence not previously considered by OWCP. The Board found that their statements directly addressed the basis upon which OWCP had denied appellant's claim as they related to whether he was in the performance of duty prior to his injury. Accordingly, the Board set aside the August 2, 2012 decision and remanded the case for OWCP to conduct a merit review of the case.

Following remand, OWCP issued an April 17, 2014 decision. It denied modification of its prior decision finding that appellant was not in the performance of duty at the time of the November 24, 2010 incident. OWCP reviewed the statements of C.S. and J.H. and found that this evidence of record was insufficient to establish that appellant was authorized to work beyond his normal work hours. It relied on the statements of N.S. denying that she had asked appellant to work overtime and indicated that there was no budget to accommodate duplicate work because an afternoon supervisor was assigned on November 24, 2010 to handle any such issues.

In an April 15, 2015 letter, received by OWCP on July 7, 2015, appellant, through counsel, requested reconsideration. Counsel contended that OWCP committed legal error in its April 17, 2014 decision as it had failed to consider the overtime provisions of the Fair Labor Standards Act (FLSA) in determining whether appellant was in the performance of duty on November 24, 2010. She further contended that the employing establishment did not keep accurate or adequate records regarding employees' overtime work. Counsel asserted that appellant had submitted sufficient evidence to establish a reasonable inference that he worked beyond his normal tour on November 24, 2010 and that the employing establishment had not submitted evidence to negate this inference.

Counsel submitted unit feedback reports, documents related to the employing establishment's timekeeping and overtime pay policies, declarations from employees who indicated that N.S. had harassed appellant, a clock ring report which indicated that he began his tour at 8:00 a.m. and ended his tour at 6:30 p.m. on November 24, 2010, and a July 31, 2015 employing establishment letter requesting that OWCP deny his request for reconsideration. She also resubmitted evidence already of record.

In an August 5, 2015 decision, OWCP denied modification of the April 17, 2014 decision. It found that the evidence submitted was insufficient to establish that appellant sustained an injury on November 24, 2010 while in the performance of duty.

By letter dated April 6, 2016, received by OWCP on April 13, 2016, counsel requested reconsideration and essentially reiterated the contentions she advanced in her April 15, 2015

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<sup>5</sup> *Supra* note 3.

reconsideration request. She also contended that OWCP's decision should be vacated because it was based on the false statements of N.S. as to what occurred on November 24, 2010 and that such statements interfered with appellant's economic advantage and intentionally inflicted emotional distress. In addition, N.S. retaliated against him for filing complaints with his congressman, the employing establishment's Office of Inspector General (OIG), and the Equal Employment Opportunity Commission (EEOC) alleging that she falsified employees' time records, created a hostile work environment, and harassed and discriminated against him by controverting his claim in 2010. Counsel asserted that, in denying appellant's claim on the merits, OWCP failed to consider the Board's prior finding about the evidence that warranted remand of the case for further development as to whether he was in the performance of duty. Lastly, she asserted that its reliance on the statement of N.S. that appellant was not working at the time of injury was misplaced based on her lack of credibility and integrity.

In an April 6, 2016 declaration, appellant provided a log of his work activities on November 24, 2010 from 7:00 a.m. to 7:09 p.m. He noted that he remained off work due to his serious injuries from November 26, 2010 to January 8, 2011. Appellant reiterated the allegations with regard to why he worked overtime on November 24, 2010, harassment and poor recordkeeping by N.S., the complaints he filed against her, and OWCP's failure to follow the Board's instructions and continued denial of his claim. He also submitted evidence previously of record.

In a July 12, 2016 decision, OWCP denied merit review of appellant's claim. It found that the evidence submitted in support of the reconsideration request was repetitious, cumulative, irrelevant, and immaterial. OWCP noted that appellant submitted no new relevant argument.

### **LEGAL PRECEDENT**

Section 8128 of FECA vests OWCP with a discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.<sup>6</sup> Section 10.608(b) of OWCP's regulations provide that a timely request for reconsideration may be granted if OWCP determines that the claimant has presented evidence and/or argument that meet at least one of the standards described in section 10.606(b)(3).<sup>7</sup> This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>8</sup> Section 10.608(b) provides that when a request for reconsideration is timely, but fails to meet at least one of these three requirements, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.<sup>9</sup>

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<sup>6</sup> 5 U.S.C. § 8128(a).

<sup>7</sup> 20 C.F.R. § 10.608(a).

<sup>8</sup> *Id.* at § 10.606(b)(3).

<sup>9</sup> *Id.* at § 10.608(b).

## ANALYSIS

On April 6, 2016 appellant requested reconsideration of OWCP's August 5, 2015 decision that denied modification of the denial of his traumatic injury claim. OWCP found that he was not in the performance of duty when he tripped and fell in a parking lot on November 24, 2010. The underlying issue on reconsideration is factual in nature, whether appellant met his burden of proof to establish that he was in the performance of duty at the time of his fall.

The Board finds that appellant has not shown that OWCP erroneously applied or interpreted a specific point of law, nor did he advance a relevant legal argument not previously considered. In an April 6, 2016 request for reconsideration, counsel continued to assert that OWCP failed to apply the overtime provisions of FLSA to his case, the employing establishment failed to maintain accurate or adequate timekeeping records, that he had submitted sufficient evidence to establish a reasonable inference that he worked beyond his normal tour of duty on November 24, 2010, and that the employing establishment had not submitted any evidence to negate this inference. These contentions, however, were previously raised by appellant and addressed by OWCP in its August 5, 2015 decision. Evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case.<sup>10</sup> Because these arguments have been previously considered, they were insufficient to require OWCP to conduct a merit review.

Counsel's arguments that N.S. lacked credibility and integrity due to false statements she made about the November 24, 2010 incident and that she was biased and retaliated against appellant for filing complaints with his congressman, the employing establishment's OIG, and the EEOC are irrelevant to the underlying issue as they are either similar to prior assertions about N.S.'s character<sup>11</sup> or do not relate to the events occurring on November 24, 2010. The submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>12</sup> Furthermore, appellant did not submit any pertinent new and relevant evidence to support his general allegations that N.S. was not forthcoming about the events occurring on November 24, 2010.<sup>13</sup>

On reconsideration and on appeal, counsel asserts that, in denying appellant's claim on the merits, OWCP failed to consider the Board's prior finding about the evidence that warranted remand of the case for further development as to whether he was in the performance of duty. However, on remand, OWCP acted in accordance with the Board's remand instructions and reviewed the merits of his case. It subsequently issued the April 17, 2014 decision again denying his claim. OWCP specifically noted the statements of J.H. and C.S. which served as a basis for

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<sup>10</sup> *J.P.*, 58 ECAB 289 (2007).

<sup>11</sup> *See id.*

<sup>12</sup> *See J.J.*, Docket No. 16-0555 (issued June 2, 2016); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

<sup>13</sup> *See A.K.*, Docket No. 09-2032 (issued August 3, 2010) (appellant claimed that the employing establishment and his coworkers lied to him regarding the handling of his claim but appellant did not provide any evidence to support his contentions; the Board found that appellant's assertions did not advance a previously unconsidered legal argument or show that OWCP erroneously applied or interpreted a specific point of law).

the Board's November 8, 2013 remand decision and found that this evidence was insufficient to establish that appellant was in the performance of duty on November 24, 2014. Consequently, the Board finds that appellant is not entitled to further review of the merits based on the first and second requirements under section 10.606(b)(3).

Appellant also did not otherwise submit any relevant and pertinent new evidence with his April 6, 2016 request for reconsideration. His April 6, 2016 declaration noted a log of his work activities on November 24, 2010 from 7:00 a.m. to 7:09 p.m. and reiterated his contentions regarding harassment and poor recordkeeping by N.S., the complaints he filed against her, and OWCP's failure to follow the Board's instructions and continual denial of his claim. Appellant also submitted evidence previously of record. As stated, evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case.<sup>14</sup> Likewise, the evidence he resubmitted was already of record and considered by OWCP in prior decisions and, thus, did not warrant further merit review.<sup>15</sup>

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

### **CONCLUSION**

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

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<sup>14</sup> See *supra* note 10.

<sup>15</sup> *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 12, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 15, 2017  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board